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No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAMUEL R. HOCHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. 4a-9a) are reported at 277 F. 2d 631. The opinion of the district court (Pet. 2a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1960 (Pet. 10a). A petition for a rehearing was denied on June 7, 1960 (Pet. 11a). An order by the Chief Justice extended the time for filing

a petition for a writ of certiorari to and including August 5, 1960. The petition was filed on August 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, in a prosecution for knowingly receiving obscene books, properly excluded evidence as to certain other books, alleged to be similar, being sold to the public.

2. Whether the evidence supports the jury's finding that the petitioner knew the books were obscene.

STATEMENT

The petitioner was charged in count I of an indictment returned in the United States District Court for the Eastern District of Wisconsin with knowingly taking from a common carrier five copies of an obscene publication called "The Sex Factory," which had been transported in interstate commerce from New York City to Milwaukee in violation of 18 U.S.C. 1462 (R. 7). Counts II and III charged similar violations as to publications called "Presenting Bubbles Darlene" and "Virgins Come High" (R. 7-8). The jury found petitioner guilty on counts I and III, and not guilty on count II (Tr. 185).[1] The court imposed a general sentence on both counts of imprisonment for one and one-half years and a $1,000 fine (R. 64). On appeal (R. 70) the conviction was affirmed (Pet. 4a-10a).

[1] "Tr." refers to the transcript of the trial proceedings.

The evidence introduced at the trial may be summarized as follows:

1. The petitioner operated a novelty and book store in Milwaukee, Wisconsin (Tr. 75-76). A salesman from the Padell Book Company of New York called upon and left with the petitioner some book covers and a price list (Tr. 77-78). In May, 1957, the petitioner went to New York to purchase books from Padell (Tr. 27-28, 79). The petitioner was in the store about half an hour (Tr. 28, 35). Mr. Padell testified that petitioner was checking the titles of books for about fifteen or twenty minutes and "[g]lancing them through" (Tr. 29-30, 36). The petitioner riffled the pages of the books, but Mr. Padell did not see him reading them (Tr. 37-38). The petitioner gave a list of the books he wanted to Mr. Padell, who had them shipped to Milwaukee (Tr. 32-34).

On May 31, 1957, the shipment of the ordered books was delivered to the petitioner (Tr. 21-23). F.B.I. agents had the petitioner's place of business under surveillance, and entered a few minutes after delivery of the books (Tr. 10-11). The petitioner admitted having received the shipment, and gave the agents permission to examine the unopened carton (Tr. 11, 87-89). They found 101 publications comprising about 20 different titles, among which were copies of "The Sex Factory" (count I) and "Virgins Come High" (count III) (Tr. 11-12, 89). Several months later the agents returned about 65 of the books which the petitioner sold (Tr. 89-90).

The petitioner testified that Mr. Padell said that in his 30 years in the book business he had not had any

trouble, and that the petitioner would not have to "be afraid of [the books purchased] as far as the law is concerned" (Tr. 86-87). The petitioner stated that he paid $1.50 per copy for "The Sex Factory" and "Virgins Come High", and his retail price was to be $3 each (Tr. 93-94). He testified that prior to the date of the trial he had not read either of these books (Tr. 90-91).

2. The petitioner attempted to introduce in evidence a copy of "Lady Chatterley's Lover", which was on the best seller list in Milwaukee in August, 1959, at the time of the trial (Tr. 113). The theory was that current best sellers show the contemporary community standards regarding obscenity (Tr. 106-108). The court sustained the prosecution's objection that the indictment referred to 1957, so that it was immaterial that "Lady Chatterley's Lover" was a best seller in 1959 (Tr. 113-114). The petitioner did, however, show that "Peyton Place" was a best seller in May, 1957, the time of the offenses charged (Tr. 114-115). The court permitted defense counsel to read excerpts from this novel describing a number of sexual acts, as an aid to the jury in judging the standards of the community (Tr. 111, 123-139).

The petitioner offered to show by the testimony of a vice squad officer that during 1957 books similar to defendant's Exhibits 11 and 12[2] containing nude

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[2] Defendant's Exhibits 11 and 12 had been purchased from newsstands during the trial, and had been excluded on the ground that they were not addressed to the period in the indictment, and that the court was not trying the question as to whether these exhibits were obscene (Tr. 120-123).

photographs had been sold at all newsstands and had been left untouched by the police since they were regarded as art studies and not obscene. The court, in excluding this evidence, stated:

> We are not trying a Milwaukee city ordinance; we are trying the question of whether a Federal statute has been violated by shipping in interstate commerce obscene literature. If it be true that obscene literature is sold in Milwaukee and the Vice Squad is doing nothing about it, that has nothing to do with this case [Tr. 141-142].

ARGUMENT

1. The petitioner contends (Pet. 6-7) that the court deprived him of his right to show literary "contemporary community standards" under *Roth* v. *United States*, 354 U.S. 476, and *Smith* v. *California*, 361 U.S. 147, by excluding from evidence the novel "Lady Chatterley's Lover," and a police officer's proffered testimony that books similar to the petitioner's were being openly sold at Milwaukee newsstands (Statement, *supra*, pp. 4-5). The court of appeals found it unnecessary to consider the issue in view of the fact that in that court, no attack was made on the validity of the conclusion that the books are obscene.[3] Assuming that the issue is properly here, there was no error in the court's rulings. As to "Lady Chatterley's Lover," the court excluded the evidence on the ground that its circulation in 1959 was too remote for the evidence to have probative

[3] The petitioner states that obscenity was not conceded; it was simply not argued. (Pet. 10-11.)

value as relating to books received in 1957. Cf. *United States* v. *Kaye*, 251 F. 2d 87, 90 (C.A. 2), certiorari denied, 356 U.S. 919; *Lloyd* v. *United States*, 226 F. 2d 9, 17-18 (C.A. 5). The court did permit defense counsel to endeavor to show contemporary standards regarding literature dealing with sex, by reading a number of passages from the novel, "Peyton Place," shown to have been a best seller at the time of the offenses charged (Tr. 111, 114-115, 123-139).

As to the evidence that books like those received by the petitioner were being sold on the newsstands, the court was clearly correct in ruling that the fact that others were selling similar materials, whether in violation of municipal obscenity ordinances or not, was not a defense available to the petitioner. Cf. *Grell* v. *United States*, 112 F. 2d 861, 875 (C.A. 8); *Saunders* v. *Lowry*, 58 F. 2d 158, 159 (C.A. 5).

2. The jury was fully justified in finding, under the court's instructions (Tr. 169, 171-172, 180-181), that the petitioner knew the books were obscene.

It was not necessary that the prosecution produce evidence that the petitioner was seen reading the books. As Mr. Justice Brennan observed in *Smith* v. *California*, 361 U.S. 147, 154: "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." Here the jury could draw the reasonable inference from the attendant circumstances that the petitioner was aware of the

contents of the books. The court below noted that the obscenity "screams forth from the picture on the cover" (Pet. 7a). In view of that fact, the petitioner's glancing through the books and riffling the pages were sufficient to warrant an inference as to his knowledge. And the jury could well believe, as did the trial court, that the high $3 price for the paper books "was based upon something such as that there was a hazard in the business of transporting, owning, and selling such 'literature'" (Pet. 3a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1960.